Written Statement of

Michael J. Gerhardt, Arthur B.Hanson Professor, William & Mary Law School

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It is an enormous privilege to participate in today's hearing, "Limiting Federal Court Jurisdiction to Protect Marriage for the States." I understand the purpose of today's oversight hearing is to examine the Congress' power to limit federal jurisdiction, or to employ what are commonly called jurisdiction-stripping measures, in response to recent court decisions on marriage. As members of this Committee well know, jurisdiction-stripping raises some profound questions of constitutional law. While the Supreme Court acknowledges that the Congress has broad power to regulate federal jurisdiction, this power is not unlimited. In my judgment, the Congress cannot exercise any of its powers under the Constitution – not the power to regulate interstate commerce, not the Spending power, and not the authority to define federal jurisdiction – in a manner that violates the Constitution. If Congress acts with the purpose and effect of violating a constitutional right, that violates the Constitution. If Congress acts in a way that prevents the federal courts from ensuring state law complies with the Constitution, that violates Article VI of the Constitution. If Congress keeps Article III courts from invalidating an unconstitutional law, that violates basic separation of powers. If Congress withdraws jurisdiction in such a way that eviscerates the Supreme Court's basic function in deciding cases arising under the Constitution and ensuring finality and uniformity in the interpretation and enforcement of federal law, that, too, violates separation of powers. If Congress withdraws or restricts

federal jurisdiction for a particular class of American citizens or based on the exercise of fundamental rights, that violates the Fifth Amendment. In short, Congress cannot use its power to restrict federal jurisdiction in ways that violate rights and equal protection, offends federalism, or infringes separation of powers.

Distrust of "unelected judges" does not qualify as a legitimate basis, much less a compelling justification, for congressional action. "Unelected judges," in the form of our federal judiciary, are integral to protecting the rule of law in our legal system, balance of power among the branches, and protecting unpopular minorities from the tyranny of the majority. For good reason, the Supreme Court has never upheld efforts to use the regulatory power over federal jurisdiction to regulate substantive constitutional law. With all due respect, I urge the Committee today to do as its predecessors have done in recognizing the benefits of our constitutional systems of separation of powers and federalism far outweigh whatever their costs. Below, I explain in greater detail the basic principles restricting congressional regulations of jurisdiction in retaliation against, or in efforts to influence, substantive judicial outcomes.

I.

General Principles

The Constitution allows judicial decisions on constitutional means to be displaced by two means and two means only. The first is by a constitutional amendment. Article V of the Constitution sets forth the requirements for amending the Constitution. In our history, constitutional amendments have overruled only a few constitutional decisions, including both the Eleventh and Fourteenth Amendments.

Thus, it would not be constitutional for the Congress to enact a statute to overrule a court's decision on constitutional law. For instance, it would be unconstitutional for the Congress to seek to overrule even an inferior court's decision on the Second Amendment by means of a statute. The second means for displacing an erroneous constitutional decision is by a court's overruling its own decisions or by a superior court. For instance, the United States Supreme Court has expressly overruled more than a hundred of its constitutional decisions. On countless other occasions, the Court has modified, clarified, but not overruled its prior decisions on constitutional law. It is perfectly legitimate to ask the Court, but to command it, to reconsider a constitutional decision.

To be sure, Article III grants the Congress authority to regulate federal jurisdiction. This power is acknowledged almost universally as a broad grant of authority, but it is not unlimited. The Congress has no authority to overrule a judicial decision on constitutional law, even under the guise of regulating federal jurisdiction. Indeed, the Supreme Court has long recognized that the Congress may not use its power to regulate jurisdiction -- or, for that matter, any other of its powers -- in an effort to influence substantive judicial outcomes. *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507 (1997); Dickerson v. United States, 530 U.S. 428 (2000). *See also* Ex Parte Klein, 80 U.S. 128 (1871). Efforts, taken in response to or retaliation against judicial decisions, to withdraw all federal jurisdiction or even jurisdiction of inferior federal courts on questions of constitutional law are transparent attempts to influence, or displace, substantive judicial outcomes. For several decades, the Congress, for good reason, has refrained from enacting such laws. The closest the Congress has come to doing this has been in insulating certain war-time measures from judicial review, but I am unaware of any jurisdiction-stripping proposals pending in the House designed to protect national security.

Moreover, proposals that would limit the methods available to Article III courts to remedy constitutional injuries are constitutionally problematic. The problem with such restrictions is that, as the Task Force of the Courts Initiative of the Constitution Project found, "remedies are essential if rights are to have meaning and effect." Indeed, the bipartisan Task Force was unanimous "there are constitutional limits on the ability of legislatures to preclude remedies. At the federal level, where the Constitution is interpreted to vest individual rights, it is unconstitutional for Congress to preclude the courts from effectively remedying deprivations of those rights." While Congress clearly may use its power to regulate jurisdiction to provide for particular procedures and remedies in inferior federal courts, it may do so in order to increase the efficiency of Article III courts not to undermine those courts. The Congress needs a neutral reason for procedural or remedial reform. While national security and promoting the efficiency of the federal courts qualify plainly as such reasons, distrust of the federal judiciary does not.

II.

Restricting All Federal Jurisdiction over Particular Federal Laws or Claims

Sometimes the House considers proposals to restrict all federal jurisdiction with respect to certain federal laws (or actions). For instance, bills have been introduced to preclude inferior federal courts from deciding cases involving abortion rights, school prayer, and gay marriage. In effect, such proposals would restrict both inferior federal courts and the Supreme Court from enforcing, interpreting, or adjudicating certain substantive matters. Consequently, the courts of last resort for interpreting, enforcing or entertaining challenges to laws restricting federal jurisdiction over such matters

are the highest courts in each of the fifty states.

Any proposal to withdraw all federal jurisdiction over a particular federal law has several constitutional defects, in my judgment. The first is that it eviscerates an essential function of the United States Supreme Court – namely, to declare what the Constitution means in "cases arising under the Constitution." Perhaps the most famous statement of this principle can be found is Professor Henry Hart's observation a half century ago that restrictions on federal jurisdiction are unconstitutional when "they destroy the essential role of the Supreme Court in the constitutional system." Henry Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362 (1953). The Court's essential function includes at the very least, as the Supreme Court famously declared in Marbury v. Madison, 5 U.S. 137 (1803), to "say what the law is," particularly in cases involving the interpretation of the Constitution or federal law;[1] and Congress may not undermine this function under the guise of regulating federal jurisdiction.[2] As the Task Force of the

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[1]For more elaborate discussions of the Court's essential functions, *see, e.g.*, Leonard Ratner, *Majoritarian Constraints on Judicial Review: Congressional Control of Supreme Court Jurisdiction*, 27 Vill. L. Rev. 929 (1982); Lawrence Sager, *Forward: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 Harv. L. Rev. 1 (1981); Leonard Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. Pa. L. Rev. 157 (1960).

[2]Some authorities suggest a different, or additional basis, for the unconstitutionality of excluding all federal jurisdiction over a particular federal law or constitutional claim. In Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) (1816), Justice Story construed the vesting clause of Article III as requiring, inter alia, "the whole judicial power of the United States should be, at all times, vested in an original or appellate form, in some courts created under its authority." His point was that at least some article III court ought to be empowered to wield the entire judicial power of the United States. Yale Law School professor Akhil Amar has modifed this argument. He contends that article III requires that "all" cases arising under federal law, "all" cases affecting ambassadors, and "all" cases of admiralty or

Courts Initiative of the Constitution Project recognized, "legislation precluding court jurisdiction that prevents the judiciary from invalidating unconstitutional laws is impermissible. Neither Congress nor state legislatures may use their powers to keep courts from performing their essential functions of upholding the Constitution."

Moreover, Congress cannot vest jurisdiction in courts to enforce a law but prohibit it from considering the constitutionality of the law that it is enforcing. The Task Force of the Courts Initiative of the Constitution Project unanimously concluded "that the Constitution's structure would be compromised if Congress could enact a law and immunize that law from constitutional judicial review." This is precisely what a measure excluding all federal jurisdiction with respect to a federal enactment seeks to do. For instance, it would be unconstitutional for a legislature to assign the courts with enforcing a criminal statute but preclude them from deciding the constitutionality of this law. It would be equally unlawful to immunize any piece of federal legislation from constitutional judicial review. If Congress could immunize its laws from the Court's judicial review, then this power could be used to insulate every piece of federal legislation from Supreme Court review. For instance, it is telling that in response to a Supreme Court decision striking down a federal law criminalizing flag-burning, many members of the Congress proposed amending the Constitution. This was an appropriate response allowed by the Constitution, but enacting the same bill but restricting federal jurisdiction over it would be unconstitutional.

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maritime jurisdiction must be vested, either as an original or appellate matter, in some Article III court. Akhil Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 Boston U. L. Rev. 205 (1985).

In addition, courts must have the authority to enjoin ongoing violations of constitutional law. For example, the Congress may not preclude courts from enjoining laws that violate the First Amendment's guarantee of freedom of speech. If an article III court concludes that a federal law violates constitutional law, it would shirk its duty if it failed to declare the inconsistency between the law and the Constitution and proceed accordingly.

Proposals to exclude all federal jurisdiction would, if enacted, open the door to another, equally disastrous constitutional result – allowing the Congress to command the federal courts on how they should resolve constitutional results. In Ex Parte Klein, 80 U.S. at 146-47, the Supreme Court declared that it

> seems to us that it is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power . . . What is this but to prescribe a rule for the decision of a cause in a particular way? . . . Can we do so without allowing that the legislature may prescribe rules of decision to the Judicial Department or the government in cases pending before it? . . . We think not. . . We must think that Congress has inadvertently passed the limit which separates the legislature from the judicial power.

The law at issue in Ex Parte Klein attempted to foreclose the intended effect of both a presidential pardon and an earlier Supreme Court decision recognizing that effect. The Court struck the law down. In all likelihood, the same outcome would arise with respect to any other law excluding all federal jurisdiction, for such a law is no different than a law commanding the courts to uphold the law in question, a command no doubt Article III courts would strike down even if they thought the law in

question was constitutional. There is no constitutionally meaningful difference between these laws, because the result of a law excluding all federal jurisdiction over a federal law and a command for the courts to uphold the law are precisely the same – preserving the constitutionality of the law in question.

A proposal to withdraw all federal jurisdiction with respect to a particular federal matter conflicts with a second, significant limitation on the Congress' power to regulate jurisdiction: The Congress may not use its power to regulate jurisdiction to control substantive judicial outcomes. The obvious effect of a prohibition of all federal jurisdiction is to make it nearly impossible for the law to be struck down in every part of the United States. The jurisdictional restriction seeks to increase the likelihood that the federal statute will not be fully struck down.

Moreover, a proposal excluding all federal jurisdiction regarding a particular federal question undermines the Supreme Court's ability to ensure the uniformity of federal law. In effect, such a proposal would allow the highest courts in each of the fifty states to become courts of last resort for interpreting, enforcing, or adjudicating challenges to the law. This allows for the possibility that different state courts will construe the law differently, and no review in a higher tribunal is possible. The Court's essential functions include ensuring finality and uniformity across the United States in the enforcement and interpretation of federal law.

The third major problem with a proposal to exclude all federal jurisdiction is that it may violate the equal protection component of the Fifth Amendment Due Process Clause. *See* Bolling v. Sharpe, 347 U.S. 497 (1954) (recognizing, inter alia, that congruence requires the federal government to follow the same constitutional standard as the Fourteenth Amendment Equal Protection Clause requires states

to follow). The Court will subject to strict scrutiny any classifications that explicitly burden a suspect class or fundamental right. A federal law restricting all federal jurisdiction with respect to it or some other federal law does both. First, it may be based on a suspect classification. A jurisdictional regulation restricting access by African-Americans, or a particular religious group, to Article III courts to vindicate certain interests ostensibly because of mistrust of "unelected judges" plainly lacks a compelling justification and thus violates the equal protection class. While the usual constitutional measure of a jurisdictional regulation is the rational basis test, a court might find that even that has not been satisfied if the court finds the argument in support of burdening African-Americans, women, or Jews is illegitimate. While the Court has not employed strict scrutiny to analyze the constitutionality of laws burdening gays and lesbians, the Court has found two such fail even to satisfy the rational basis test. A court analyzing whether a classification precluding a gay or lesbian citizen from petitioning any Article III court would probably conclude that such a restriction is no more rational than the classification struck down by the Supreme Court in Romer v. Evans, 517 U.S. 620 (1996). In *Romer*, the Court found that the state referendum disadvantaging gays and lesbians failed to pass the rational basis test, because it had been motivated by animus. In all likelihood, a majority of the Supreme Court would strike down such a measure as having been driven by the same illegitimate concerns, or attitudes, that it rejected in that case.

A federal law restricting all federal jurisdiction may also run afoul of the Fifth Amendment by violating a fundamental right. Such is the case with a proposal restricting all federal jurisdiction over flag burning or school prayer. It is unlikely that the Court would find a compelling justification for burdening fundamental rights. I cannot imagine that the justices would agree that distrusting "unelected judges"

qualifies as a compelling justification. Nor is a regulation excluding all federal jurisdiction over a matter involving the exercise of fundamental rights, for it precludes Article III courts even from enforcing the law.

In addition, a proposal excluding all federal jurisdiction may violate the Fifth Amendment's Due Process Clause's guarantee of procedural fairness. Over a century ago, the Court declared that due process "is a restraint on the legislative as well as the executive and judicial powers of the government, and cannot be construed to leave congress free to make 'any due process of law,' by its mere will." For instance, the Court has explained "that the Due Process Clause protects civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs seeking to redress grievances." A proposal excluding all federal jurisdiction effectively denies a federal forum to plaintiffs whose constitutional interests have been impeded by the law, even though Article III courts, including the Supreme Court, have been designed to provide a special forum for the vindication of federal interests.

Excluding all federal jurisdiction with respect to some federal law forces litigants into state courts, which are often thought to be hostile or unsympathetic to federal interests. To the extent that the federal law burdens federal constitutional rights, it is problematic both for the burdens it imposes and for violating due process. Basic due process requires independent judicial determinations of federal constitutional rights (including the "life, liberty, and property" interests protected explicitly by the Fifth Amendment). Because state courts are possibly hostile to federal interests and rights and under some circumstances are not open to claims based on those rights, due process requires an Article III forum.

Last but not least, as the authors of a leading casebook on federal jurisdiction have observed,

"At least since the 1930s, no bill that has been interpreted to withdraw all federal court jurisdiction with respect to a particular substantive area has become law." R. Fallon, D. Meltzer, D. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 322 (2003). This refusal, for good reasons, constitutes a significant historical practice that argues for, rather than against, precluding all federal jurisdiction in retaliation against judicial decision(s).

III.

Restricting the Jurisdiction of Inferior Federal Courts

Another kind of proposal sometimes made in the Congress is to preclude the jurisdiction of the inferior federal courts. Unlike the kinds of laws considered in the prior section, this kinds of law allows for the possibility of Supreme Court review albeit by way of petition for certiorari from the state courts. Nevertheless, this proposal has at least three constitutional defects. First, this proposal may violate the equal protection component of the Fifth Amendment Due Process Clause because it may burden a suspect class without a compelling justification or narrow tailoring. It is well settled that a group, or class, that is characterized by its exercise of a fundamental right is a suspect class. Hence, a bill that barred inferior federal courts from hearing any constitutional challenges may be directed at a suspect class, particularly if the group it burdens is defined by its exercise of a fundamental right that the restriction at issue is burdening.

The second major problem with withdrawing jurisdiction over a particular class of cases from

inferior federal courts is that it may violate separation of powers.[3] Imagine, for instance, that an inferior court had struck down a state law prohibiting flag-burning before the Supreme Court had decided on the constitutionality of that law. If Congress had enacted a law precluding any other inferior courts jurisdiction over the flag, its law would be unconstitutional for both attempting to override the effects of a substantive judicial decision and for hindering the exercise of a first amendment right.

The third problem with a proposal undertaken in retaliation against the federal judiciary is that it may violate the Fifth Amendment due process clause. The Congress' power to regulate jurisdiction may withdraw jurisdiction in Article III courts for neutral reasons, such as promoting their efficiency, national security, or improving the administration of justice. Neither mistrust of the federal judiciary nor hostility to particular substantive judicial decisions (or to particular rights) qualifies as a neutral justification that could uphold a congressional regulation of federal jurisdiction. It is hard to imagine why an Article III court, even the Supreme Court, would treat such distrust as satisfying the rational basis test required for most legislation. By design, Article III judges have special attributes -- life tenure and guarantee of undiminished compensation -- that are supposed to insulate them from majoritarian retaliation. They are also supposed to be expert in dealing with federal law and more sympathetic to federal claims than their state counterparts. *See* Martin v. Hunters' Lessee, 14 U.S. 304 (1816). Yet,

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[3]Professor Theodore Eisenberg has argued that the Framers understood "that the federal courts, whatever their form, could be expected to hear any litigant whose case was within the federal constitutional jurisdiction, either at trial or on appeal." Theodore Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 Yale L.J. 498 (1974). He suggests that the Framers assumed that the Supreme Court could accomplish this objective, but argues, as do many other scholars, that this assumption is no longer practical. Eisenberg argues that Congress may exclude cases from federal jurisdiction for "neutral" policy reasons, such as to avoid case overloads or promote the efficiency of federal courts.

a proposal that excludes inferior federal court jurisdiction is ill-designed to achieve its purported purpose, because it still allows state courts to hear challenges to the Pledge of Allegiance and retains possible jurisdiction over those challenges in the Supreme Court. As long as Supreme Court review is possible (and it appears to be), "unelected" justices will decide the merits of the challenges. It is hard to see that there is even a rational basis for believing that the "unelected judges" on the nation's inferior federal courts – all nominated by presidents and confirmed by the Senate (with the exception of two recess appointees) – cannot be trusted to perform their duties in adjudicating claims relating to the Pledge of Allegiance. If a district court judge fails to do this or an appellate federal court fails to do this, their decisions may be appealed to higher courts.

Congress has shown admirable restraint in the past when it has not approved legislation aimed at placing certain substantive restrictions on the inferior federal courts. (I note that pending before the Court is the question whether the President's, rather than the Congress', authority to preclude all jurisdiction over claims brought by people detained in Guantanemo Bay based on their detention.) Over the years, there have been numerous proposals restricting jurisdiction in the inferior courts in retaliation against judicial decisions, but the Congress has not enacted them. The Congress has further refused since 1869 not to expand or contract the size of the Court in order to benefit one party rather than another. These refusals, just like those against withdrawing all federal jurisdiction in a particular class of constitutional claims, constitute a significant historical practice – even a tradition -- that argues against, rather than for, withdrawing jurisdiction from inferior courts over particular classes of constitutional claims.

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Beyond the constitutional defects with proposals to exclude certain cases from all federal jurisdiction or inferior federal courts, they may not be good policy. They may send the wrong signals to the American people and to people around the world. Under current circumstances, they express hostility to Article III courts, in spite of their special function in upholding constitutional rights and enforcing and interpreting federal law. If a branch of our government demonstrates a lack of respect for federal courts, our citizens and citizens in other countries may have a hard time figuring out why they should do otherwise. Rejecting proposals to exclude all federal jurisdiction or inferior court jurisdiction for some constitutional claims extends an admirable tradition within the Congress and reminds the world of our hard-won, justifiable confidence in the special role performed by Article III courts throughout our history in vindicating the rule of law.